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The Attorney General's Conference  
on the  
Criminal Justice System: Approaches to Reform

The Grand Hotel  
Washington, D.C.  
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Luncheon Address

Consequences of Federalizing Criminal Law

The power of Congress to define federal crimes has been exercised more and more in recent years to criminalize conduct primarily and traditionally the concern of the several states. Although I refer to this development as the federalization of criminal law, a law school faculty colleague tells me that I should use the term "nationalization" rather than "federalization." Of course, he also thinks that the original Federalists and Anti-Federalists called themselves by the wrong names. With all due respect to some of those present, academics certainly know how to confuse an issue. To be fair, academics are not the only ones who cause confusion. There is a Federalist Society whose members likewise seem unable to distinguish Federalists from Anti-Federalists. However it is described, the development to which I refer has had and continues to have some serious consequences worthy of our attention. Before reviewing those consequences, I turn to an examination of how and why the federal government has come to be involved in the prosecution of crimes historically handled at the state level.

In urging ratification of the Constitution, the Framers assured their countrymen that "internal order," as they called it, would be the responsibility of the several states. The Constitution itself refers only to a few specific crimes: counterfeiting; treason; piracies and felonies committed on the high seas; and offenses against the law of nations. The earliest Congresses found authority in these provisions, in their enumerated powers and in the Necessary and Proper Clause to classify as criminal various types of conduct generally thought to be detrimental to the operations of the central government. Customs offenses, crimes committed within federal enclaves and interference with the federal courts fell within this category of exclusive federal jurisdiction. All other varieties of crimes were defined by state legislatures and prosecuted in state courts.

As the nation expanded and the population increased in the aftermath of the Civil War, new forms of anti-social conduct came to the attention of Congress. In response to the "green cigar" scam and other quaint frauds then current, Congress included an anti-fraud provision in the 1872 codification of the postal laws. Thus was born the notion that the national interest required federal prosecution of any scheme or artifice to defraud as long as the mails were involved. The sponsor of the postal legislation said that the mail fraud provision was necessary "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascals generally, for the

purpose of deceiving and fleecing the innocent people of the country." Although Congress could point to its constitutional power to establish post offices as authority for the legislation, this concept of fraud as a federal crime marked the first serious trenching on state criminal jurisdiction.

At the turn of the century, Congress discovered the Interstate Commerce Clause as a source of criminal jurisdiction. The Supreme Court approved, and the criminal law never has been the same. The supposed need to protect the channels of interstate commerce led to the enactment of the Lottery Act, prohibiting the interstate transportation of lottery tickets, and the Mann Act, prohibiting the transportation of women across state lines to engage in immoral practices. The latter statute impelled my late colleague, Henry Friendly, to ask this rhetorical question in his 1972 lecture on federal jurisdiction: "Why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut, although it would not if the love-nest were in Port Chester, N.Y.?" Judge Friendly questioned whether federal criminal prosecutions of this type serve any true federal interest. I question whether such prosecutions constitute a threat to the dual system of government so carefully constructed by the Framers of our Constitution.

Misuse of the channels of commerce has formed an important theoretical underpinning for the ongoing expansion of federal criminal jurisdiction. Under this rubric, Congress has

replicated many state criminal statutes, adding only an interstate element: kidnapping, theft, transportation of stolen vehicles, flight to avoid prosecution, sexual exploitation of children, firearms offenses and gambling are some examples. As recently as 1984, a whole new slew of state-type offenses were federalized on the basis of interstate movement. These included the counterfeiting of credit cards and theft of livestock having a value in excess of \$10,000. Yes indeed, cattle rustling is now a federal crime!

When the Supreme Court approved congressional regulation of activities affecting commerce, it sanctioned the most expansive basis for criminal intervention in crime control yet invoked. This concept provided the shaky constitutional support necessary for such legislation as the Hobbs Act, which reaches the local crimes of robbery and extortion, and the Extortionate Credit Transaction Act, which reaches the local crime of loansharking. The Drug Abuse Prevention and Control Act, which now generates more than twenty percent of all federal criminal prosecutions, includes a congressional declaration that federal prosecution of intrastate drug trafficking is necessary for the control of the interstate incidents of trafficking. Here again, the "affecting commerce" concept was called upon as authority for federalizing crimes punishable in all states of the Union. The Racketeer Influenced and Corrupt Organizations Act not only is grounded in the same interpretation of the commerce power but also includes in its definition of racketeering activity a list of specific

crimes chargeable under state law. The Travel Act is another example of a statute involving a wholesale incorporation of state crimes. The list goes on.

I think that the impetus for the expansion of federal criminal law into areas of state and local concern has come from three directions: from Congress; from federal prosecutors; and from local and state governments themselves. In the case of Congress, a common procedure is to identify a problem involving unacceptable conduct in one state or region, classify that conduct as criminal, and define it in terms of a new federal crime, regardless of whether it is already a state crime. This procedure is often unaccompanied by any determination of the willingness or ability of state government to deal with the problem. Federal prosecutors have been known to argue for expansive interpretations of federal criminal legislation in an effort to fill perceived gaps in local criminal prosecution. An example is the use of the mail fraud statute to prosecute local criminal corruption. Unfortunately, the courts often go along with these arguments. Chief Justice Burger once opined that, as new types of frauds develop, the mail fraud statute can be used as a stopgap device to deal with the new phenomenon on a temporary basis until specific legislation is enacted. Finally, state and local governments, complaining of a lack of resources, find it convenient to defer to federal prosecution rather than to face up to issues they are actually in a better position to

confront. Sometimes, of course, a breakdown in local law enforcement leaves federal intervention as the only alternative.

Reform in the criminal justice system is the theme of today's Conference, and reform in the criminal justice system requires consideration of the consequences of the federalization of criminal law. Some of the consequences are obvious and some are not so obvious, but they all implicate important pragmatic and constitutional problems. The consequence most obvious to me, of course, is the overloading of federal courts brought about by the prosecution of cases lacking in any direct federal interest or involvement. We see such cases every day and can only wonder why they are not prosecuted in the state courts, which are fully equipped to handle them. That a bank is federally insured, for example, does not seem to create a very great federal interest for conferring jurisdiction on federal courts to hear cases involving one hundred dollar bank thefts. Yet there is a statute that confers federal jurisdiction in just such cases. The federal courts should be reserved for such important direct federal interest crimes as capturing or killing carrier pigeons owned by the United States, 18 U.S.C. § 45; interstate transportation of water hyacinths, 18 U.S.C. § 46; false crop reports, 18 U.S.C. § 2072; and false weather reports, 18 U.S.C. § 2074. Between 1983 and 1987, criminal filings in the United States District Courts increased by 25% to 42,000. In some districts now, the courts have little time for anything but criminal trials. This detracts from other important work that

ought to be performed by those courts, including what I consider to be their most important work -- the protection of individual civil rights and civil liberties when the states have failed to do so. Court overload is a serious consequence indeed.

Every time Congress rushes to enact a criminal statute to deal with a problem that exists in one state or one region, there is an erosion of the dual system of government so carefully established by those who wrote our national charter. What may be considered serious anti-social conduct in one part of the country may not be considered quite so serious elsewhere. Gambling may be offensive to the citizens of Utah but not to the citizens of Nevada. The states must be allowed to accommodate such differences and to experiment with innovative approaches to the prosecution of crime. Many states already have charted new courses in the areas of sentencing, plea bargaining, victims' rights and other criminal procedures as well as in the definition of substantive crimes. State supreme courts have interpreted state constitutions to create in criminal cases rights not guaranteed by the United States Constitution.

President Roosevelt said that a state experiment that fails has little effect on the rest of the nation. It is also true that states can modify or repeal unworkable methods and approaches much more quickly than can the national government. By contrast, federal legislation affects the entire nation, is cumbersome to change, and often remains on the books long after it loses any value it once may have had. In this regard, I refer



you to 18 U.S.C. § 336, which imposes criminal liability upon one who issues a check for less than \$1.00, intending it to circulate as money. I don't know exactly what that section means, but I think that we can safely say that it has outlived its usefulness.

Federal courts now are bound to sentence according to guidelines established by a Sentencing Commission. I cannot comment on the constitutionality of the legislation establishing the Commission, but I can question the wisdom of turning the federal judiciary into a corps of mechanics required to impose criminal punishment without regard to family considerations or local conditions. All of this is done in the name of eliminating disparity, a goal that is at least questionable. A sentence imposed without individualized consideration in federal court that would be much different if imposed in a state court for the same crime may serve neither the needs of the defendant nor the community of which he is a part. The excision of conduct detrimental to society must be accomplished by a scalpel rather than a chain saw.

I am afraid of federal prosecutors. I am terrified by federal prosecutors. The reason for my fear is the extraordinary discretion that they have in deciding what crimes to prosecute. That discretion is one of the consequences of the federalization of criminal law. Like the Attorney General, I once was a state prosecutor. State prosecutors are not quite as fearsome as their federal counterparts because their discretion is much more limited. When police agencies or private individuals came to me

as district attorney with evidence of crime, I was constrained to prosecute, unless the evidence was so deficient that no case could be made. United States Attorneys labor under no such constraints. How could it be otherwise? Priorities must be assigned. There are only so many federal prosecutors, and they cannot be tied up in prosecuting the interstate transportation of water hyacinths. With more federal crimes on the books than could be prosecuted in any ordinary lifetime, government attorneys must be very selective as to which cases they will pursue and which they will decline. I remember visiting a federal prison facility in my district when I was a district judge. The warden begged me to persuade the U.S. Attorney to prosecute some cases of assault on prison guards. The U.S. Attorney had declined to prosecute those cases in favor of what he considered were more important matters. As federal crimes proliferate, there are more declinations, some of which seem quite arbitrary and capricious to federal law enforcement agencies. When there are many offenders but only a few are chosen to be prosecuted, the public perceives that the process is unfair. Moreover, in making the critical decisions about what types of anti-social conduct are worthy of attention, the prosecutor invades the domain of the legislator, and the separation of powers is blurred.

There is another major consequence of the ongoing expansion of the criminal code through the inclusion of state-type offenses. I call it "the disappointment of promises unfulfilled." A more

harsh description might be "the deception of the public." As Congress passes laws purportedly solving various problems through the federal criminal justice system, the public often assumes that the law is the solution. Obviously, it is not. To illustrate: Everybody knows that most narcotic transactions are punishable under federal law. The ordinary citizen has every right to expect that violations will be prosecuted vigorously. Yet nobody makes it clear that only an infinitesimal number of the 55,000 narcotics arrests made in New York City in one year can be prosecuted federally. The federal resources simply aren't there. Congress can convert state crimes into federal crimes forever, but United States courts and United States prosecutors will never be able to handle more than a tiny portion of the tens of thousands of crimes committed in the nation each year. Great expectations lead to great disappointments, an unfortunate consequence of too much federal criminal law.

It seems almost unnecessary to observe that two laws on the same subject lead to duplication -- duplication in investigation, duplication in prosecution and duplication in punishment. Recently, there was an unseemly competition between state and federal authorities in New York City over who should pursue some cases of municipal corruption. The clash ended in an agreement to divide the work. It is true, of course, that conflicts between state and federal agencies have diminished greatly in recent years as the result of the Justice Department's promotion of Law Enforcement Coordinating Committees. This program

replaces competition with cooperation among law enforcement agencies and has been very successful. There really is no need for double punishment, however, and sentences by state and federal courts for the same crimes, although not violative of the constitutional prohibition against double jeopardy, appear to violate its spirit.

In many important respects, the federalization of criminal law discourages individual involvement and personal participation in the democratic process, and this is the final consequence I intend to address. Probably the greatest danger to the republic today is the apathy of the citizenry. For many years, I have told the story of the jury foreman who announces a verdict in these words: "Your Honor, we have decided not to get involved." Involvement, of course, is the key to the success of our form of government. My wife spends a great deal of time speaking at schools and colleges and wherever else young people gather to encourage the type of involvement of which I speak. Yet participation is most lacking at the level where it should be the most widespread -- the local government level. The citizenry increasingly has been conditioned to turn to federal law enforcement and to the federal courts as the first line of defense against anti-social conduct. What we are witnessing is an abdication of responsibility for self-government. In the face of municipal corruption, it is easy to send for the "feds." If narcotics are sold on the street corners of a major city, it is a simple matter to invoke high-profile federal criminal prosecution.

When loansharks and racketeers infest a municipality, local law enforcement efforts can be relaxed if federal help is on the way. To invite federal authorities to define and prosecute crime involving activities primarily of state and local interest is to concede that state and local government cannot be moved to serve the will of the people and that the people are willing to forego their form of government. I do not believe that Americans are prepared to make that concession.

By now you know that, at least as far as I am concerned, the uninhibited growth of federal criminal law has produced some disturbing consequences. I have my own thoughts about what needs to be done, but those are for another day. Hopefully, every member of this distinguished company also will have some opinions and suggestions relating to the matters I have discussed. Regardless of where we stand on some of these issues, we have a common goal and that is to develop the very best criminal justice system possible. I am grateful for the opportunity to participate in this Conference because, like all of you, I am dedicated to that goal.